EDITOR'S NOTE

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91-5843

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Case No.:

DENNIS SOCHOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Did the Florida trial and appellate courts violate the Eighth and Fourteenth Amendments by giving no weight to the mitigating evidence in imposing and reviewing petitioner's death sentence?

2. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?

3. In a capital case, does an instruction on an uncharged theory of guilt violate the Fifth, Sixth, Eighth, or Fourteenth Amendments?

4. Did the application of Florida's "especially heinous, atrocious or cruel" aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Case No.:

DENNIS SOCHOR, PETITIONER,

vs.

STATE OF FLORIDA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

Petitioner, Dennis Sochor, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida, which affirmed his convictions and sentences for first degree murder and kidnapping.

CITATION TO OPINION BELOW

The decision of the Supreme Court of Florida in this cause appears as Sochor v. State, 580 So.2d 595 (Fla.1991), and is set out at Exhibit A of the appendix to this petition.[1]

---

[1] References to the record on direct appeal will appear as R __.

JURISDICTION

The Florida Supreme Court entered its opinion on May 2, 1991, and denied Mr. Sochor's timely motion for rehearing on June 18, 1991. 580 So.2d 595; App. A. The jurisdiction of this Court is invoked under 28 U.S.C. 1257, Mr. Sochor having asserted in the state court below and asserting in this Court that the State of Florida has deprived him of rights secured by the Constitution of the United States.

PROVISIONS OF LAW

The Fifth Amendment provides in pertinent part:

> ...nor shall [any person]...be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation....

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

Section 921.141, Florida Statutes, which governs capital sentencing proceedings in Florida, is set out in the appendix. In simple terms, the statute creates a three stage procedure. Subsection 2 provides that, after the defendant has been found

guilty, the jury is to render a penalty verdict after determining whether "sufficient aggravating circumstances exist" (subsection 5 sets out the aggravating circumstances) and whether "sufficient mitigating circumstances exist which outweigh the aggravating circumstances" (subsection 6 sets out statutory mitigating circumstances). Subsection 3 provides that "[n]otwith-standing the recommendation of a majority of the jury," the trial court is to engage in its own weighing of aggravating and mitigating circumstances and enter written findings of fact supporting the sentencing decision. Nevertheless, the trial judge may not override a life verdict unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Subsection 4 provides for automatic appellate review by the state supreme court.

The appendix also contains section 787.01, Florida Statutes (kidnapping) and section 782.04(1), Florida Statutes (first degree murder).

STATEMENT OF THE CASE

Dennis Sochor was indicted by a state grand jury in Broward County, Florida for the offenses of first degree murder and kidnapping. The case was tried to a jury, which found him guilty of both offenses. At a subsequent hearing, the jury recommended that Mr. Sochor be sentenced to death for the first degree murder. The trial court judge followed that recommendation and also sentenced Mr. Sochor to life imprisonment for the kidnapping. On

appeal, the Florida Supreme Court affirmed the convictions and sentences.

A. The evidence at trial showed that, on the evening of December 31, 1981, Patricia Gifford and a friend went to a bar in Broward County, Florida to celebrate New Year's Eve. At the bar, she conversed with Dennis Sochor, who had gone to the bar with his brother, Gary. Ms. Gifford's companion fell ill, and the Sochor brothers helped Ms. Gifford take her to her car. Then, at Gary's suggestion, Ms. Gifford decided to join the men in getting something to eat, and the three set off in a truck driven by Mr. Sochor. Before getting into the truck, Ms. Gifford and Dennis were kissing in the parking lot. The accounts of what happened next are somewhat confused. Gary Sochor, the state's main witness at trial, and the only eyewitness to the offense, testified to the following regarding the trip in the truck:

> Q Did there come a time when the vehicle stopped?
>
> A I remember the vehicle coming to a stop, and Denny got out of the truck and ---
>
> Q Now, do you remember a time when Patty said something to you?
>
> A Patty was hollaring [sic] for help, asking what was going on.
>
> Q Who was she yelling to help her?
>
> A Myself. I got out of the passenger's side, ran around the vehicle, and Denny had her on the ground, had her hands pinned down. I hollared [sic] at him, and ---
>
> Q What was she doing at that time, Patty?
>
> A Just laying [sic] there, and I couldn't understand what was happening, and I just hollared [sic] at Denny to leave her alone.

I went and picked up a stone, looking for a rock or stone or something, and I remember throwing -- not to hit him. I threw the stone just above his head to scare him, and he turned and looked at me and told me to get back in the truck, which I did.

Q And why did you get back in the truck?

A Well, in our past, Denny would -- we would get in brotherly arguments and fights, and sometimes Denny would get real furious and --

Q Let me ask you this: How did he look when you saw him out there? Describe him, if you would, to the ladies and gentlemen of the jury.

A I wouldn't know what came over him at times, but a couple of times in our past and at that particular time ---

Q Do you need a drink of water, Gary?

A Some air.

MR. HANCOCK: Can we get a drink of water for him?

Q (By Mr. Hancock) Just relax.

A The pupil would roll back, and all I'd see is white in his eyes, and he'd be very -- real furious, and in a voice that wasn't his. It would be deep, and would scare you.

Q And can you describe this look?

A He looked to be possessed.

Q What do you mean by "he looked to be possessed?"

A Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil.

Q Now, you indicated you had seen this look before; correct?

A Yes.

Q Now, after that, you indicated you got back in the truck; correct?

A Yes.

Q And after getting back in the truck, can you tell the ladies and gentlemen of the jury what you did?

A I put my face in my hands, in my lap, and just sat there.

Q And how long was it before Dennis came back into the truck?

A It seemed to be around five minutes, a couple of minutes, not very long.

Q Did you ever see Patty again?

A No.

Q And what happened after he got back in the truck?

A As we started down the road -- and it's not hard to remember, but it's just I can remember him starting to talk to me, and I started screaming because I didn't want to hear anything he had to say. I didn't look at him. I didn't sit up. I was just screaming.

Q And why didn't you make any effort to help Patty?

A I was scared of him. We got in some fights in our past, and I usually ended up on the short end of the deal.

Q And after you got back in, did he say anything to you about telling anyone?

A All I remember is the screaming, just screaming, not saying anything, just screaming, and all I remember him saying was that if I didn't shut up, I'd never see my family again.

Q When he gave that threat to you, what did you say or do?

A The next thing I remember, I stopped screaming, and I sat straight up in the truck, and I seen the stoplight, and it was like I didn't remember a thing. I mean I asked him to take me to the beach.

> Q And did there come a time when he went back to his place?
>
> A All I remember now is arguing with him about taking me to the beach.
>
> Q Did you get back to the apartment, to where he was living?
>
> A Yeah, he wouldn't take me to the beach, and we got back to the apartment, and I remember getting out and still arguing about I wanted to go down to the beach, and I can remember somebody at the other apartment hollaring [sic] at us to quiet down.

R 316-20.

Dennis Sochor gave several taped statements to police officers after his arrest in May 1986, which were summarized by the Florida Supreme Court in its opinion as follows:

> ... Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa. From there he went to New Orleans where he stayed for some time before moving to Atlanta where he was arrested.

580 So.2d at 599 (footnote omitted).

In addition, several psychologists and psychiatrists testified regarding Mr. Sochor's mental state at the time of the offense, basing their testimony on examinations occurring after his arrest in 1986. It appears that none of these witnesses knew much about the circumstances of the incident or of Gary Sochor's statement

that Dennis was berserk at the time of the offense.[2] Based on their limited knowledge, they testified that Mr. Sochor was legally sane at the time of the offense, did not meet the criteria for involuntary hospitalization of mentally incompetent persons under Florida's "Baker Act" (sections 394.451 through 394.4789, Florida Statutes), but was an alcoholic and had abused drugs, and had mental problems.

B. At the sentencing phase, the state presented to the jury testimony regarding previous violent sexual batteries committed by Mr. Sochor in Florida and in Michigan, and testimony from his former wife regarding violent sexual acts that he had committed against her. The former wife also testified that Mr. Sochor had stolen purses from prostitutes while stationed in Italy as a paratrooper. Mr. Sochor presented evidence from family members detailing extensive and brutal physical abuse by his father during his childhood, showing that Mr. Sochor had been placed in a mental hospital in the past, that he could go berserk under the influence of alcohol, and that his mother abused him as a child.

C. In his sentencing order, the trial court judge wrote regarding the statutory mental health mitigating circumstance of extreme mental or emotional disturbance:[3]

> This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent.

---

[2] R 662-63 (testimony of Dr. Zager); R 721 (testimony of Dr. Ceros-Livingston).

[3] § 921.141(6)(b), Fla.Stat.

> Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollections of the murderous incident.

R 1234. The judge wrote concerning the statutory mitigating circumstance of extreme duress:[4] "This mitigating circumstance does not apply." Id. Regarding the statutory mitigating circumstance of substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law,[5] he wrote:

> This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

R 1234-35. He wrote the following regarding nonstatutory mitigation circumstances:

> There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

R 1235.

---

[4] § 921.141(6)(e), Fla.Stat.

[5] § 921.141(6)(f), Fla.Stat.

In affirming the death sentence, the Florida Supreme Court wrote:

> Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, an indescribable feeling comes over him in the form of an irresistible impulse particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. Stano v. State, 560 So.2d 890 (Fla.1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had "selective amnesia." While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.
>
> Sochor also argues that the trial court failed to consider and improperly excluded nonstatutory mitigating evidence. The court in its sentencing order stated "[t]here were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory 'mitigating' circumstances." This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was

> unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. King v. Dugger, 555 So.2d 355 (Fla.1990); Scull v. State, 533 So.2d 1137 (Fla.1988), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

580 So.2d at 603-604.

D. At sentencing, the prosecutor argued to the jury that the murder of Ms. Gifford was cold, calculated, and premeditated,[6] and the trial court instructed the jury on that aggravating circumstance. In the sentencing order, the trial court, in imposing the death penalty, found that the facts of the case supported the aggravating circumstance. On appeal, the Florida Supreme Court struck the circumstance:

> We disagree, however, that the murder was committed in a cold, calculated, and premeditated manner. Although there was sufficient evidence to support a premeditated murder conviction, this aggravator requires a "heightened" level of premeditation. Hamblen v. State, 527 So.2d 800 (Fla.1988). The evidence introduced at trial failed to demonstrate this requisite heightened level of premeditation. Rather, the killing most likely resulted from the victim's refusal to have consensual sex with Sochor and her resistance when he attempted to force himself upon her.

580 So.2d at 603. Nevertheless, the court upheld the death sentence, writing at page 604:

> The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

E. The prosecutor also argued to the jury at sentencing that the murder was "especially heinous, atrocious, or cruel,"[7] and the trial court used the circumstance in sentencing Mr. Sochor to death:

> The Court finds, according to Florida Statutes 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that violent struggle ensued as confirmed by the Defendant's statements to the police officers. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear

---

[6] Under section 921.141(5)(i), Florida Statutes, the jury and judge in a capital sentencing proceeding may consider in aggravation that the murder "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The Florida Supreme Court has limited application of the circumstance in various ways, ruling that the circumstance normally applies to "execution and contract-style killings," Garron v. State, 528 So.2d 353, 361 (Fla. 1988), and that it requires proof of "a careful plan or prearranged design" evincing "heightened premeditation." Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988) (defining "calculated"). Florida's jury instructions do not inform the sentencing jury of these limiting constructions.

[7] § 921.141(5)(h), Fla.Stat.

there was fear and definitely emotional trauma before her death.

R 1232-33.[8] Affirming, the supreme court wrote:

> The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. Adams, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Tompkins v. State, 502 So.2d 415, 421 (Fla.1986) (citations omitted), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.#d.2d 781 (1987). Accord Johnson v. State, 465 So.2d 499 (Fla.), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); Doyle v. State, 460 So.2d 353 (Fla.1984). The trial court properly found this aggravating factor.

580 So.2d at 603.

F. Mr. Sochor raised in the Florida Supreme Court the issues now raised in this petition. The first issue (failure to weigh mitigating evidence) was raised at pages 113-122 and 128-29 of his initial brief in that court. (Mr. Sochor's initial brief and motion for rehearing are contained in the apendix to this petition.) The second issue (improper use of the "cold, calculated, and premeditated" aggravating circumstance) was raised

[8] Actually, the evidence did not show that Ms. Gifford "was forcibly removed from the truck while she pleaded for help and even begged for her life." For whatever reason, the prosecutor did not ask Gary, and the investigating officers did not ask Dennis, under what circumstances Ms. Gifford got out of the truck.

at pages 107-113 of his initial brief. He raised the third issue (instruction on uncharged theories of guilt) at pages 62-65 and 76-77 of his initial brief. The fourth issue (pertaining to the "especially heinous, atrocious, or cruel" aggravating circumstance) was raised at pages 96, 104-107, and 127-28 of his initial brief.

REASONS FOR GRANTING THE WRIT

1. Failure to consider mitigation.

This case highlights the failure of Florida courts to treat mitigating evidence in a rational and constitutional manner. The evidence regarding Mr. Sochor's childhood traumas, his alcoholism, and his drug abuse problems was substantial, competent, and unrebutted. The evidence that Mr. Sochor is a mentally disordered sex offender was overwhelming. The state's main witness at trial, Gary Sochor, testified that Dennis was berserk at the time of the offense. Yet the state courts declined to give this substantial mitigating evidence any weight in sentencing him to death.

A. Although the Eighth Amendment requires that in capital cases the sentencer must consider all relevant mitigating evidence, Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion), Florida courts have a history of failing to consider such evidence in reaching capital sentencing decisions. See Hitchcock v. Dugger, 481 U.S. 1821 (1987) and Parker v. Dugger, 111 S.Ct. 731 (1991). Section 921.141 itself contains a list of so-called statutory mitigating circumstances, and the Florida courts originally forbade consideration of any "non-statutory" mitigation. Hitchcock Thereafter, Florida courts developed the concept of non-statutory "circumstances," but have tended to treat these non-statutory circumstances differently from the statutory circumstances. For instance, the Florida Supreme Court upheld a death sentence in Bruno v. State, 574 So.2d 76 (Fla. 1991) where it found that there were no statutory mitigating circumstances, but

gave no consideration on appeal to non-statutory mitigation: "In light of three statutory aggravating circumstances and no statutory mitigating circumstances, we find no error in the judge's sentence of death." Id. 83. Especially confused has been the consideration of non-statutory mental mitigating circumstances. Although trial court sentencing orders usually discuss the statutory circumstances of extreme disturbance and substantial impairment, they routinely ignore such non-statutory circumstances as psychological stress, developmental or educational disabilities, less than extreme disturbance, and less than substantial impairment. E.g. Hegwood v. State, 575 So.2d 170 (Fla. 1990) (trial court did not consider evidence that defendant emotionally and mentally handicapped), Cheshire v. State, 568 So.2d 908 (Fla. 1990) (error for judge to limit consideration of mental disturbance to "extreme" mental disturbance: "Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say."), and McKinney v. State, 579 So.2d 80 (Fla. 1991) (trial court did not consider non-statutory mental circumstances). Also, trial courts make the mistake of equating the statutory mental mitigating circumstances with the standard for legal insanity or for incompetency to stand trial. E.g. Mines v. State, 390 So.2d 332, 336-37 (Fla. 1980).

The Florida Supreme Court has undertaken sometimes inconsistent attempts to regularize consideration of mitigating evidence. Although section 921.141 calls for written factual findings as to mitigating evidence, and the Court has indicated that they are necessary to prevent arbitrary application of the

death penalty, Proffitt v. Florida, 428 U.S. 242, 250-51 (1976) (plurality opinion) ("Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible..."), the Florida Supreme Court long held that such findings were not necessary. In, e.g., Mason v. State, 438 So.2d 374, 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), the court wrote: "The trial judge need not have expressly addressed each non-statutory mitigating factor in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached."

Subsequently, the court realized that the lack of specific factual findings made appellate review virtually impossible, and resulted in uneven application of the death penalty:

> There appears to be some confusion over the concept of mitigation as set forth in our death penalty statute, which requires "specific written findings of fact based upon [aggravating and mitigating] circumstances ...and upon the records of the trial and the sentencing proceedings." § 921.141(3), Fla.Stat. (1985). However, a "finding" that no mitigating factors exist has been construed in several different ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.
>
> However, any consideration of mitigation must fall within certain established guidelines. In the context of the death penalty, the concept of mitigation requires that the court
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> > not be precluded from considering, as a mitigating factor, any aspect of a

> > defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.... Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in noncapital cases.

Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978) (emphasis in original, footnote omitted). Moreover,

> > [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence .... The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) (emphasis in original, footnote omitted). See also Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Mindful of these admonitions, we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of

sufficient weight to counterbalance the aggravating factors.

Rogers v. State, 511 So.2d 526, 534 (Fla. 1987) cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). And in Campbell v. State, 571 So.2d 415 (Fla. 1990), the court held that the sentencing order must contain specific factual findings as to mitigation. In Lucas v. State, 568 So.2d 18, 24 (1990), the court, citing a 1982 case, wrote that such findings must be of "unmistakable clarity," and, citing a 1979 case, said that the written findings are necessary to full appellate review. (The court made no mention of the cases, such as Mason, holding that such findings are unnecessary.) But despite these holdings, the court has continued to uphold death sentences where the sentencing order does not address mitigating evidence.

In Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990), decided three months after Campbell and one week before Lucas, the court upheld a death sentence containing no factual findings as to non-statutory mitigation. In Valle v. State, 581 So.2d 40, 49 (Fla. 1991), the court approved a sentencing order that made no mention of mitigating evidence regarding the defendant's mental state at the time of the crime, writing: "The mere fact that the judge made no further reference to Valle's mental state at the time of the offense does not mean the court gave it no consideration." Similarly, in Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990), decided less than a month after Lucas, the court upheld imposition of the death penalty where the trial court expressly rejected the extreme disturbance circumstance but did not mention non-statutory mental mitigation. In Downs v. State, 572 So.2d 895, 901 (Fla.

1990) the court acknowledged that the defendant presented "substantial valid nonstatutory mitigating evidence," but upheld the judge's sentencing order that did not specifically consider the mitigating circumstances presented. See also Cook v. State, 581 So.2d 141, 144 (Fla. 1991) (failure to consider nonstatutory evidence in sentencing order harmless).

Thus, although specific findings are required under the statute and Constitution, and are necessary for meaningful review, the court has conducted (apparently meaningless) appellate review and upheld sentencing orders that do not make specific findings.

Also confused have been Florida court pronouncements regarding the proof of mitigating factors.[9] The court has sometimes held that it is not error to refuse to consider unrebutted mitigation, and has at other times held that it is error. In Pope v. State, 441 So.2d 1073 (Fla. 1983), the court approved the trial court's rejection of unrebutted evidence that the defendant suffered from post-traumatic stress syndrome as a result of service in Viet Nam; and in Rutherford v. State, 545 So.2d 853 (Fla. 1989) the trial court paid no heed to apparently uncontradicted evidence concerning the defendant's background and nonviolent nature, and his service as a Marine infrantyman in Viet Nam. On the other hand, the court wrote in Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988) that the sentencer must consider evidence of alcohol or drug abuse "especially where established by uncontroverted factual evidence

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[9] Similarly, the court has gone back and forth on the effect of mitigating evidence on the trial court's power to impose a death sentence where the jury has rendered a life verdict. See Pentecost v. State, 545 So.2d 861, 863, n.3 (Fla. 1989).

in the record," citing a number of cases holding that uncontroverted evidence must be accepted as proof of a factual issue; and in Campbell, the court wrote:

> The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

This is a question of law. A mitigating circumstance can be defined broadly as "any aspect of the defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Valid nonstatutory mitigating circumstances include but are not limited to the following:

1) Abused or deprived childhood.

2) Contribution to community or society as evidenced by an examplary work, military, family, or other record.

3) Remorse and potential for rehabilitation; good prison record.

4) Disparate treatment of an equally culpable codefendant.

5) Charitable or humanitarian deeds.

This is a question of fact and the court's finding will be presumed correct and upheld on review if supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See, e.g., Hallman v. State, 305 So.2d 180 (1974) (victim's throat slit with broken bottle); Spinkellink v. State, 313 So.2d 666 (1975) ("career criminal" shot sleeping traveling companion); Gardner v. State, 313 So.2d 675 (1975) (brutal beating and murder); Alvord v. State, 322 So.2d 533 (1975) (three women killed by strangulation, one raped); Douglas v. State, 328 So.2d 18 (1976) (depraved murder); Henry v. State, 328 So.2d 430 (1976) (torture murder); Dobbert v. State, 328 So.2d 433 (1976) (torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.

571 So.2d at 419-20. In Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990), the court wrote that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved."

B. The patternless network of Florida decisions regarding mitigation has led directly to the unconstitutional treatment of Mr. Sochor's mitigating evidence. The trial court's sentencing order gave no consideration to the state's own evidence that Mr.

Sochor was out of his mind at the time of the offense,[10] gave no consideration to the non-statutory mitigating factors regarding Mr. Sochor's mental state at the time of the offense, and treated the substantial, competent, and unrebutted evidence regarding his childhood in summary fashion, giving it no effect in the weighing process of reaching the sentencing decision. The trial court used an improper standard regarding the extreme mental or emotional disturbance circumstance: the judge refused to apply the circumstance because Mr. Sochor did not meet the standard for involuntary hospitalization of mentally incompetent persons when examined in 1986, some five years after the offense. This standard is unconstitutional: if Mr. Sochor were mentally incompetent, he would not be tried, so that the extreme disturbance circumstance could never come into play. Hence, the standard used by the trial court would preclude consideration of evidence of mental disturbance at the time of the offense.

The Florida Supreme Court compounded the trial court's unconstitutional refusal to weigh uncontroverted mitigating evidence. Ignoring its own precedents such as Campbell (issue of whether a proven factor constitutes mitigation is a question of law; evidence of abused or deprived childhood is mitigating as a matter of law), Nibert (same), Hardwick (sentencer must consider uncontroverted evidence of alcohol or drug abuse) and Robinson v. State, 574 So.2d 108 (Fla. 1991) (psychosexual disorder found as mitigation) the court wrote that the judge and jury are free to

[10] Florida prosecutors are bound by the testimony of their main witnesses. Davis v. State, 90 So.2d 629, 632 (Fla. 1956); D.J.G. v. State, 524 So.2d 1024 (Fla.App. 1987).

ignore mitigating evidence. As to the overwhelming evidence of Mr. Sochor's sexual disorders, the court wrote: "It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury." As to the trial court's rejection of the statutory mental mitigating circumstances, the court wrote that it saw no reason to disturb the trial court's rejection of them. As to the evidence regarding Mr. Sochor's background, the court wrote: "Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. King v. Dugger, 555 So.2d 355 (Fla. 1990); Scull v. State, 533 So.2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance."[11] Thus the supreme court gave no weight to the mitigating evidence, deferring entirely to the trial court.

C. In view of the foregoing, Mr. Sochor's death sentence is illegal: the trial court failed to consider valid mitigating evidence in violation of Hitchcock and did not make factual findings regarding mitigation as required by Proffitt, and the Florida Supreme Court did not, could not, undertake the full appellate review required by Proffitt. The treatment of mitigating evidence in Florida is so arbitrary that the application of mitigating factors to specific cases has become largely a matter of caprice. Hence, Florida's death penalty is applied in an unconstitutional manner.

[11] In King and Scull the court merely held that "An age of twenty-something is 'iffy' as a mitigating circumstance." King, 555 So.2d at 358 (citing Scull).

2. Inadequacy of appellate review.

After striking the "cold, calculated, and premeditated" aggravating circumstance, the Florida Supreme Court upheld Mr. Sochor's death sentence because the trial court found no mitigating circumstances. This was improper where the court did not reweigh the evidence, and it did not undertake a harmless error analysis.

A. Where a state appellate court has struck an aggravating circumstance, it must order resentencing unless it either reweighs the evidence and determines that the death sentence is still appropriate, or conducts a harmless error analysis and determines that the sentencer would have sentenced the defendant to death even without erroneous use of the aggravating circumstance. Parker v. Dugger, 111 S.Ct. 738-39, and Clemons v. Mississippi, 110 S.Ct. 1441 (1990). The Florida Supreme Court did neither at bar.

B. Although the Court understood in Proffitt v. Wainwright, 428 U.S. 242, 252-53 (1976) (plurality opinion) that the Florida Supreme Court would reweigh the sentencing circumstances in all capital cases, that court has consistently refused to do so. E.g. Freeman v. State, 563 So.2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh these circumstances."). At bar, the court followed its practice and refused to reweigh the circumstances, deferring to the trial court's judgment regarding mitigation.

C. The court also failed to conduct a harmless error review, for to conduct such a review it would have had to consider the effect of the improper circumstance on the jury. Although the ultimate sentencing decision is the judge's, that decision is

strongly influenced by the jury's penalty verdict: where there is a life verdict, the judge can impose a death sentence only where no reasonable person could agree with imposition of a life sentence. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This is a very high standard: in 1990, the court reversed every death sentence to come before it on direct review where there was a life verdict; in 1991 it has affirmed only one. A life verdict virtually mandates a life sentence. Hence, a sentencing error cannot be harmless unless it could have had no effect on jury's penalty verdict. The Florida Supreme Court has often, but not always, recognized this principle.

Exemplary of the court's confused approach is its decision reversing Thomas Trotter's death sentence on the ground that an aggravating circumstance had been improperly applied. In its initial decision, the court ordered resentencing by the judge. Trotter v. State, 16 Fla.L.W. S17, S18 (Fla. Dec. 20, 1990). But on rehearing, the court ordered a jury resentencing, with no explanation for the change in the relief granted. 576 So.2d 691, 694.

Two decisions rendered the same day further muddy the waters. In Capehart v. State, 16 Fla.L.W. S447 (Fla. June 13, 1991), the court affirmed Gregory Capehart's death sentence even though the trial court had improperly relied on the premeditation circumstance,[12] writing:

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[12] In addition to the premeditation circumstance, the trial court found three other aggravating circumstances (prior conviction of violent felony, engaged in sexual battery at time of murder, and especially heinous, atrocious, or cruel) and one mitigating circumstance ("Defendant is a poor black man exploding in anger

> Having determined one aggravating circumstance was erroneously considered by the trial judge, we must determine whether this error was harmless. The record before us reflects three valid aggravating circumstances and one nonstatutory mitigating circumstance. Having carefully scrutinized the record in this case, we are persuaded beyond a reasonable doubt that even without the aggravating circumstance of cold, calculated, and premeditated murder, the trial court still would have found that the aggravating circumstances outweighed the mitigating evidence. Thus, the error was harmless beyond a reasonable doubt. See, e.g., Holton, 573 So.2d at 293. We therefore affirm the sentence of death.

Id. S450. The court gave no explanation for how it arrived at the conclusion that the trial court would have sentenced Mr. Capehart to death without the premeditation circumstance. Equally curious was the court's failure to give any consideration to the effect that improper use of the circumstance might have had on the jury. Although the judge rejected most of Mr. Capehart's mitigating evidence, there was no reason to think that the jury did. One additional vote for life would have resulted in a life verdict,[13] which could scarcely be overridden given the substantial amount of mitigating evidence presented to the jury.

Capehart is difficult to reconcile with Omelus v. State, 16 Fla.L.W. S455 (Fla. June 13, 1991). At Ulrick Omelus's sentencing proceeding after he was convicted as the principal in a contract murder, the state argued three aggravating circumstances: the

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over his frustration due to the ills of a discriminatory society heaped upon him"), rejecting various other nonstatutory mental mitigating evidence. The jury recommended a death sentence by a vote of seven to five.

[13] A 6-6 tie is treated as a life verdict. Rose v. State, 425 So.2d 521, 525 (Fla. 1982), cert. denied, 461 U.S. 904 (1983).

pecuniary gain, premeditation, and heinousness circumstances. The trial court did not find the heinousness circumstance, but did apply the other two in sentencing Mr. Omelus to death pursuant to the jury's eight-to-four recommendation. The trial court found as a mitigating circumstance that the co-defendant, who actually committed the murder, was sentenced to life imprisonment. The supreme court found that the heinousness circumstance could not apply to Mr. Omelus,[14] and reversed the sentence for a jury resentencing, writing:

> Since the trial judge correctly did not include heinous, atrocious, or cruel as a factor in imposing the death sentence, the question that must be resolved in our harmless error analysis is whether the error in allowing this factor to be presented and considered by the jury requires a new sentencing proceeding. We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence. Further, because the issue is not in this record, the parties have not argued the propriety of a jury override in the briefs or at oral argument. We conclude that it is not appropriate for us to attempt to address that question in this case under these circumstances. Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not

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[14] Although the evidence apparently showed that the killing itself would qualify for application of the circumstance, the evidence did not show that Mr. Omelus intended that the co-defendant inflict a high degree of pain.

> harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

Id. S457. See also Jones v. State, 569 So.2d 1234, 1238-39 (Fla. 1990) (error to instruct jury on heinousness circumstance; resentencing before new jury ordered even though evidence regarding offense would not be different at resentencing).

The court took a different tack in Herring v. State, 16 Fla.L.W. S293 (Fla. May 2, 1991). In 1981, Ted Herring was charged with first degree murder of a convenience store clerk. The trial court followed the jury's eight-to-four recommendation of a death sentence, notwithstanding evidence of Mr. Herring's troubled childhood, psychological problems, learning disabilities, and low IQ. There was no evidence that he intended to kill the clerk prior to the robbery, but the trial court used the premeditation circumstance in sentencing him to death,[15] and the supreme court affirmed. Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). Three years later, in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988),[16] the court specifically disapproved of the use of the circumstance in Mr. Herring's case. Accordingly, Mr. Herring argued on post-conviction that, under Rogers, his sentence was illegal. The supreme court rejected his claim:

> While the cold, calculated, and premeditated aggravating factor no longer applies to the

[15] In all, the trial court found four aggravating circumstances and two mitigating circumstances.

[16] The court wrote in Rogers: "Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in Herring v. State [cit.], to the extent it dealt with this question." 511 So.2d at 533.

> circumstances in Herring, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.
>
> The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. Herring I at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. See Hill v. State, 515 So.2d 176 (Fla.1987), cert. denied, 485 U.S. 993 (1988).

Id. S294.

Capehart, Omelus, and Herring reflect completely different approaches to the issue. Under Capehart, the court looked only at the effect of the aggravating circumstance on the judge's sentencing decision, without regard to its possible effect on the jury. In Omelus, however, the court did look to the potential effect on the jury, even though the evidence would have been the same without the circumstance. In Herring the court also considered the effect of the error on the jury, but held that striking the circumstance could not have affected the verdict where

the striking did not affect the evidence.[17] Thus, the Florida Supreme Court has been inconsistent in its methods of determining whether to order resentencing where the jury has considered an improper circumstance. At bar, the court gave no consideration to the effect of the error on the jury, and simply held that the trial court "carefully" (albeit erroneously) weighed the evidence, and that it would not disturb its decision. Hence, the court erred in affirming Mr. Sochor's death sentence in violation of the principles set forth in Parker and Clemons.

3. Instructions on Uncharged Theories of Guilt.

Under section 787.01(1)(a), Florida Statutes, a person can be guilty of kidnapping if one confines, abducts, or imprisons another with intent: to hold the person for ransom, or to commit or facilitate commission of a felony, or to inflict bodily harm upon or to terrorize another, or to interfere with the performance of any governmental or political function. The indictment on which Mr. Sochor was tried charged kidnapping with intent only to commit the felony of sexual battery. R 1143; App. B. It alleged no intent to commit any other felony, and did not allege intent to inflict bodily harm or to terrorize. Under section 782.04(1), Florida Statutes, a person can be guilty of first degree murder if the killing was by "premeditated design" or if the killing occurred during the actual or attempted commission of any of several enumerated felonies. The indictment charged only murder "from a

[17] See also Jones v. State, 569 So.2d 1234 (Fla.1990) (new jury sentencing ordered where striking of heinousness circumstance would result in exclusion of evidence of sexual abuse on corpse).

premeditated design" and did not specify any theory of felony murder. R 1143; App. B.

Nevertheless, the jury was instructed not only on the charged theories of kidnapping with intent to commit sexual battery and murder from premeditated design, but also with the following uncharged theories: kidnapping with intent to commit bodily harm or to terrorize, R 928-29, and felony murder during the course of kidnapping or sexual battery, or during an attempt to commit one of those offense, or while escaping from the scene of one of those offenses. R 923. Mr. Sochor contended in the Florida Supreme Court, and contends now that the instruction of the jury on the uncharged theories violated the Notice Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Court wrote in Cole v. Arkansas, 333 U.S. 196, 201 (1948):

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding....It as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

See also Dunn v. United States, 442 U.S. 100, 106-107 (1979). Similarly, the primary requirements of the Notice Clause are that the charging document inform the defendant of the nature of the accusation and "inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had." Russell v. United States, 369

U.S. 749, 767, 768 (1962). The charging document must not be so framed as to let the prosecution "shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." Id. 768.

The charging document at bar violated these constitutional provisions. Mr. Sochor was tried on uncharged statutory theories and his resulting convictions are unconstitutional.

4. "Especially heinous, atrocious or cruel" aggravating circumstance.

Florida's "especially heinous, atrocious, or cruel" circumstance has been the subject of controversy and criticism for years. Commentators have written that it has not been applied consistently by the Florida Supreme Court and that the court has adopted confusing and contradictory guidelines for its application.[18] In Proffitt v. Florida, 428 U.S. 242 (1976) the Court upheld the constitutionality of the circumstance based on an interpretation of the circumstance which the Florida Supreme Court has since abandoned. The circumstance is now unconstitutional under Proffitt, Maynard v. Cartwright, 486 U.S. 356 (1988) (Oklahoma "especially heinous, atrocious or cruel" circumstance unconstitutionally vague), and Shell v. Mississippi, 111 S.Ct. 313 (1990) (Mississipi instruction on same circumstance unconstitutionally vague).

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[18] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 908 (1989); Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L. Rev. 941 (1986); and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L.Rev. 523 (1984).

In Proffitt, the Court wrote:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, ...[s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So.2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d, at 9. See also Alford v. State, 307 So.2d 433, 445 (1975); Halliwell v. State, supra, 323 So.2d at 561.[12] We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, 428 U.S., at 200-203.

428 U.S. at 254-56 (opinion of Court joined by three justices with four justices concurring).

But in 1981, Florida promulgated standard jury instructions deleting the construction approved in Proffitt, so that Mr. Sochor's jury was instructed only in the bare terms of the statute.[19] In 1984, the court approved the 1981 instructions and eliminated from the statute the constitutionally approved construction. Pope v. State, 441 So.2d 1073, 1077-788 (1984) ("No

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[19] The standard instructions, used in instructing Mr. Sochor's jury, provide:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> ....
>
> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

R 1221.

further definitions of the terms are offered, nor is the defendant's mindset ever at issue."). Since then, the court has wavered dramatically in its application of the mental element set out in State v. Dixon and approved in Proffitt. Thus, in Mills v. State, 476 So.2d 172, 178 (Fla. 1985) the court wrote that application of the circumstance depended on the intent of the defendant, and in Porter v. State, 564 So.2d 1060 (Fla. 1990), the court reversed a finding of the circumstance because the record did not show a torturous intent as required by State v. Dixon,[20] while in Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990), it wrote that the absence of a torturous intent is irrelevant: "That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This

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[20] The court wrote:

> We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and Amoros v. State, 531 So.2d 1256, 1261 (Fla.1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

564 So.2d at 1063 (emphasis in original).

aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's."

At bar, the trial court made no finding of the torturous intent required by Porter and the cases cited therein. The evidence shows that Mr. Sochor, like Mr. Porter, acted in a blind rage. Hence the application of the circumstance in this case was unconstitutionally arbitrary: the jury was given no instruction defining the circumstance, the trial court did not make the requisite findings, and the Florida Supreme Court's treatment of the circumstance varies wildly from case to case so that it cannot be applied in a constitutional manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Gary Caldwell, Esq.
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Capital Crimes Division

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OVERTON,
KETT, GRIMES,
DING, JJ., concur.

FOR REHEARING
Rehearing is denied.
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admitted to The Florida
r proceedings if he is

readmitted to practice in his home state of New York within twelve (12) months.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.



Dennis SOCHOR, Appellant,

v.

STATE of Florida, Appellee.

No. 71407.

Supreme Court of Florida.

May 2, 1991.

Rehearing Denied June 18, 1991.

Defendant was convicted of kidnapping and first-degree murder, and was sentenced to death, in the Circuit Court, Broward County, Russell E. Seay, Jr., J., and defendant appealed. The Supreme Court held that: (1) evidence was sufficient for jury to have found that murder was premeditated; (2) evidence of kidnapping was sufficient to support conviction on felony-murder theory; (3) State independently proved corpus delicti of homicide, and therefore defendant's confessions were admissible, even though victim's body had never been found; (4) evidence supported aggravating death penalty factors that defendant had been previously convicted of violent felony, that murder was committed during felony, and that murder was especially heinous, atrocious, or cruel, but did not support aggravating factor that murder was committed in cold, calculated and premeditated manner; and (5) striking one aggravating factor when there were no mitigating circumstances did not necessarily require resentencing.

Affirmed.

1. Homicide ⇐312

Jury verdict form indicating whether jurors found defendant guilty of first-degree murder based on premeditation or felony-murder was not required.

2. Homicide ⇐232, 269

Evidence was sufficient to present issue of premeditation to jury in trial for first-degree murder and to allow jury to find premeditation, where defendant's brother testified that, while victim screamed for help, brother interrupted defendant who stopped assaulting victim long enough to turn, look at brother, and shout at him to get back in truck, and that defendant then resumed his attack.

3. Homicide ⇐18(1)

Evidence of kidnapping was sufficient to support first-degree murder conviction on felony-murder theory, even though victim might have entered defendant's truck voluntarily, where victim at some point was held unwillingly, and her removal to secluded area facilitated defendant's acts, avoided detection, and was not merely incidental to or inherent in the crime.

4. Kidnapping ⇐5

Evidence supported kidnapping conviction, even though victim might have entered defendant's truck voluntarily, where victim was at some point held unwillingly, and removal of victim to secluded area facilitated defendant's acts, avoided detection, and was not merely incidental to or inherent in the crime.

5. Homicide ⇐235

Evidence of attempted sexual battery was sufficient to support first-degree murder conviction on felony-murder theory, where defendant stated that he wanted to have sex with victim and that he felt uncontrollable urge to do so, defendant stated that he thought the next day that he had raped "another girl," and defendant's brother testified that he saw defendant on top of victim while she resisted.

6. Criminal Law ⇐535(1)

Confession to crime is insufficient evidence of criminal act where no independent

evidence exists to substantiate occurrence of crime.

7. Criminal Law ⇐563

Circumstantial evidence is sufficient to prove corpus delicti.

8. Criminal Law ⇐563

Proof beyond reasonable doubt is not necessary to prove corpus delicti.

9. Criminal Law ⇐517.3(4)

Evidence was sufficient to prove corpus delicti of first-degree murder, and therefore defendant's confessions were admissible, even though victim's body was never found, where victim's disappearance was uncharacteristic, defendant's brother testified that victim was screaming for help with defendant on top of her when he last saw victim, and defendant did not contest in closing argument that victim was dead.

10. Criminal Law ⇐1030(1)

Contemporaneous objection rule does not have less force in capital case.

11. Criminal Law ⇐1030(1)

Error must amount to denial of due process to be fundamental error. U.S.C.A. Const.Amends. 5, 14.

12. Criminal Law ⇐1030(1), 1186.1

Fundamental error did not result from claimed errors, taken individually or collectively, that prosecution made comments on facts outside of evidence in capital murder trial, that government witnesses gave opinions as to defendant's veracity and guilt, that defense witness stated on cross examination that person from prosecutor's office had compared defendant to notorious serial killer, that State had argued that defendant's trial was the only time the State could try him for his crimes, that evidence was admitted as to defendant's bad character and victim's good character, beauty, and family, and that jailhouse informant gave perjured testimony as to whether he received leniency from State in return for testimony regarding defendant's incriminating statements.

13. Criminal Law ⇐1038.1(2), 1038.3

In absence of fundamental error, defendant's claims of error in jury instructions were precluded from appellate review, where defense counsel neither objected to instructions nor requested other instructions.

14. Homicide ⇐28

Voluntary intoxication is defense to felony-murder when underlying felony is specific-intent crime.

15. Kidnapping ⇐1

Kidnapping is specific-intent crime. West's F.S.A. § 787.01.

16. Criminal Law ⇐1030(1)

"Fundamental error" is error which goes to foundation of case.

See publication Words and Phrases for other judicial constructions and definitions.

17. Criminal Law ⇐1038.2

Failure to give instruction unnecessary to prove essential element of crime charged is not fundamental error.

18. Criminal Law ⇐53

Voluntary intoxication is defense to, but not essential element of, kidnapping.

19. Homicide ⇐28

State did not have to disprove defendant's claim of voluntary intoxication in order to convict defendant of felony-murder based on underlying felony of kidnapping.

20. Homicide ⇐325

Trial court did not commit fundamental error by failing to instruct jury on voluntary intoxication as defense to felony-murder based on kidnapping, but instead objection was necessary to preserve issue for appeal, especially where there was sufficient evidence of attempted sexual battery, which was general intent crime to which voluntary intoxication was not defense, upon which to base conviction of felony-murder.

21. Criminal Law ⇐1038.2

Trial court did not commit fundamental error by failing to instruct jury on statute of limitation as absolute defense to felony-murder and kidnapping, where State could have shown that, even though defen-

dant was indicted for ki
applicable four-year limi
undisputed, continuous al
tolled running of statute
§ 775.15(6).

22. Criminal Law ⇐147
Capital crimes are no
ute of limitation.
§ 775.15(1).

23. Criminal Law ⇐118
First-degree murder
not have to be overturne
tion period had expired o
ny supporting felony-mur
first-degree murder was n
ute of limitation.
§ 775.15(1).

24. Homicide ⇐325
Failure to give lon
homicide instruction was
error in trial for first-de

25. Homicide ⇐325
To preserve issue as
improperly introduced v
dence during penalty pha
der trial, objection must

26. Homicide ⇐325
Defendant's points
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or violent acts, and int
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were procedurally barre
dant's counsel did not ob
mony.

27. Homicide ⇐159
Defendant's ex-wife
garding defendant's prior
admissible during penalty
murder trial to rebut de
dant became violent only
alcohol, since ex-wife te
acts when defendant was

28. Homicide ⇐358(1)
Testimony regarding
for which defendant had n
was relevant and admissib
phase of capital murder t

APP A

dant was indicted for kidnapping beyond applicable four-year limitation period, his undisputed, continuous absence from State tolled running of statute. West's F.S.A. § 775.15(6).

22. Criminal Law ⇐147

Capital crimes are not subject to statute of limitation. West's F.S.A. § 775.15(1).

23. Criminal Law ⇐1186.1

First-degree murder conviction would not have to be overturned, even if limitation period had expired on underlying felony supporting felony-murder theory, since first-degree murder was not subject to statute of limitation. West's F.S.A. § 775.15(1).

24. Homicide ⇐325

Failure to give long-form excusable homicide instruction was not fundamental error in trial for first-degree murder.

25. Homicide ⇐325

To preserve issue as to whether State improperly introduced victim impact evidence during penalty phase of capital murder trial, objection must be made.

26. Homicide ⇐325

Defendant's points that State introduced improper evidence during penalty phase of capital murder trial regarding prior violent acts, and introduced improper hearsay testimony of, and taped confession to, rape of which there was no conviction, were procedurally barred, where defendant's counsel did not object to that testimony.

27. Homicide ⇐159

Defendant's ex-wife's testimony regarding defendant's prior violent acts was admissible during penalty phase of capital murder trial to rebut defense that defendant became violent only after consuming alcohol, since ex-wife testified to violent acts when defendant was sober.

28. Homicide ⇐358(1)

Testimony regarding rape in Michigan for which defendant had not been convicted was relevant and admissible during penalty phase of capital murder to rebut mitigating factor of no significant history of prior criminal activity.

29. Criminal Law ⇐662.40
Homicide ⇐358(1)

Defendant's taped confession to rape for which defendant had not been convicted was admissible during penalty phase of capital murder trial, and did not violate *Rhodes* doctrine that admission of victim's taped statement violates defendant's confrontation rights.

30. Homicide ⇐325

Alleged errors in jury instructions during penalty phase of capital murder trial had not been preserved for appeal, where defendant did not object to those instructions at trial.

31. Homicide ⇐311

Felony-murder instruction was not inadequate during penalty phase of capital murder trial, even though it did not define the underlying felony, where trial court had instructed jury on underlying felonies during guilt phase.

32. Homicide ⇐357(5)

Aggravating sentencing factor in trial for capital murder that defendant had been previously convicted of violent felony was applicable regardless of whether defendant was convicted of first-degree murder based on premeditation theory or felony-murder theory.

33. Criminal Law ⇐1035(8), 1037.1(2)

Defendant's claim that prosecutor and trial court denigrated jury's rule during penalty phase of capital murder trial had not been preserved for review, where defendant did not raise such claim at trial.

34. Homicide ⇐357(5)

Evidence supported aggravating death penalty factor that murder was committed during felony, where there was sufficient evidence of both kidnapping and attempted sexual battery. West's F.S.A. § 921.141(5)(d).

35. Homicide ⇐357(11)

Evidence supported aggravating death penalty factor that murder was especially heinous, atrocious, or cruel, even though victim's body had never been found, where defendant's brother testified that victim screamed for help after she was dragged from truck, scratches on defendant's face indicated that struggle took place, and defendant confessed that he choked victim to death. West's F.S.A. § 921.141(5)(h).

36. Homicide ⇐357(3)

Evidence failed to establish aggravating death penalty factor that murder was committed in cold, calculated, and premeditated manner, even though there was sufficient evidence to support premeditated murder conviction, where killing most likely resulted from victim's refusal to have consensual sex with defendant and her resistance when he attempted to force himself upon her. West's F.S.A. § 921.141(5)(i).

37. Homicide ⇐357(4)

Trial court properly rejected as mitigating death penalty factors that defendant was under influence of extreme mental or emotional disturbance and that his capacity to appreciate criminality of his conduct or conform his conduct to requirements of law was substantially impaired, even though there was evidence that defendant had used alcohol on night in question, there was medical testimony that defendant was dangerous and violent person when drinking, and defendant explained that he had irresistible impulse when sexually aroused; one doctor testified that defendant had not been truthful during testing and another testified that defendant had "selective amnesia."

38. Homicide ⇐357(4)

Trial court did not abuse its discretion in finding that nonstatutory evidence did not rise to mitigating death penalty circumstance, despite testimony relating defendant's physical abuse by his father, his financial support of family when his father was unable to work, his alcohol problems, and his violent temper and mental instability.

39. Homicide ⇐345

Striking one aggravating death penalty factor when there were no mitigating circumstances did not necessarily require resentencing.

40. Homicide ⇐357(4)

First-degree murder defendant's death sentence was not disproportionate, where there were three aggravating factors weighed against no mitigating circumstances.

Richard L. Jorandby, Public Defender and Gary Caldwell, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., and Celia A. Terenzio, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Dennis Sochor appeals his convictions of kidnapping and first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the convictions and the death sentence.

Testimony at trial established that, on December 31, 1981, the victim, an eighteen-year-old female, and a friend went to a lounge located in Broward county to celebrate New Year's Eve. During the course of the evening the friend became ill. Sochor and his brother, Gary, helped the victim escort her friend outside to her car. Promising her that she would return soon, the victim returned to the lounge.

Early the next morning the friend awoke in the car, discovered the victim missing, and called the police. The police obtained a photograph taken that night which showed an unidentified man sitting at the bar near the victim. The photograph was shown on television, and, several days later, that man was identified as Sochor. The police talked with Sochor's roommates who said that he had left suddenly when he saw his picture on television. They also told police that Sochor's brother, Gary, had been visiting him and had recently returned to Michigan. The police interviewed Gary who implicated his brother in the victim's disappearance and voluntarily returned to Florida to attempt to locate her body. In May 1986 authorities arrested Sochor in Georgia on

an unrelated offense and extradited him to Florida where a grand jury indicted him on charges of first-degree murder and kidnapping. The victim's body has never been recovered.

At trial Gary gave the following testimony. He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it came time to leave, the victim and his brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them. They left the parking lot with Sochor driving his employer's truck, Gary in the passenger seat, and the victim seated between them. Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and looked at Gary like a man "possessed," angrily told him to get back in the truck, and resumed his assault. Awhile later Sochor got in the truck with Gary and drove home. The next morning Gary found a woman's shoe and sweater and a set of keys in the truck. He hid the keys. Later he noticed that the truck had been cleaned and the articles removed. When told about the keys, Sochor became upset and demanded their return, which Gary did. A few days later Gary returned to Michigan.

The state also introduced Sochor's three taped confessions which it played to the jury. In these statements Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought that he killed her and drove to a secluded area where he disposed of the body. He said that Gary was not with him when this happened. When he awoke the next morning, he remembered feeling that something terrible had happened. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa.[1] From there he went to New Orleans where he stayed for some time before moving to Atlanta where he was arrested.

The jury convicted Sochor of both kidnapping and first-degree murder and, by a vote of ten to two, recommended the death penalty. The trial judge sentenced Sochor to death, finding four aggravating,[2] and no mitigating, circumstances. Sochor now appeals, claiming errors in both the guilt and sentencing phases of his trial.

[1] Sochor raises numerous claims of error in the guilt phase. His first claim is that there was insufficient evidence to convict him of either premeditated or felony murder.[3] Assuming that there are sufficient facts to present the issue to the jury, whether the evidence shows premeditation is a question of fact for the jury to decide. *Preston v. State*, 444 So.2d 939 (Fla.1984). As this Court has previously stated:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exist has been set and indeed could not be.

Larry v. State, 104 So.2d 352, 354 (Fla. 1958). *Accord Preston; Sireci v. State*, 399 So.2d 964 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

[2] After examining the record, we find sufficient evidence to present the issue of premeditation to the jury and from which the jury could have found premeditation. In addition to the circumstances of the crime, Gary testified that, while the victim screamed for help, he interrupted Sochor who stopped assaulting her long enough to turn, look at Gary, and shout at him to get back in the truck. Sochor then resumed his attack. Thus, he had a sufficient period of reflection to contemplate the nature of his act. He could have stopped his assault at that point but chose to continue. We find Sochor's claim that the offense was a heat-of-passion type homicide insufficient to preclude a finding of premeditation.

[3–5] We also find sufficient evidence of kidnapping to support Sochor's conviction on a felony-murder theory.[4] The evidence adduced at trial shows that, although the victim may have entered the truck voluntarily, at some point she was held unwillingly. Her removal from the lounge parking lot to a secluded area facilitated Sochor's acts, avoided detection, and was not merely incidental to, or inherent in, the crime. Thus, the evidence supports the underlying felony of kidnapping as well as Sochor's separate conviction of kidnapping. *See Carron v. State*, 427 So.2d 192 (Fla. 1983); *Faison v. State*, 426 So.2d 963 (Fla. 1983); *Mobley v. State*, 409 So.2d 1031 (Fla.1982).[5]

[6–9] Sochor next claims that the trial court improperly admitted his confessions because the state did not independently prove the corpus delicti of the homicide. An individual's confession to a crime is insufficient evidence of a criminal act where no independent evidence exists to substantiate the occurrence of the crime. *State v. Allen*, 335 So.2d 823 (Fla.1976). Because the victim's body has never been found, Sochor contends that the state has no evidence, other than his confession, that she is dead. In proving corpus delicti, however, circumstantial evidence is sufficient. *Buenoano v. State*, 527 So.2d 194 (Fla. 1988). Proof beyond a reasonable doubt is not necessary. *Stano v. State*, 473 So.2d 1282 (Fla.1985), *cert. denied*, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986); *Bassett v. State*, 449 So.2d 803 (Fla.1984). The victim disappeared New Year's Eve and has not been seen since that night. It was uncharacteristic for her not to come home. She had a good relationship with her family and her boyfriend and kept in touch. None of her belongings were missing from her apartment. Gary testified that when he last saw the victim she was screaming for help with his brother on top of her. We find sufficient evidence that the victim is indeed dead and that her death was due to the criminal agency of Dennis Sochor. Moreover, Sochor, in closing argument, did not contest the fact that she was dead. Rather, counsel based the defense strategy on the theories of voluntary intoxication or mistaken identity, i.e., that Gary actually committed the crime.[6]

[10] Sochor next compl
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preserved for review. *See*
Sykes, 433 U.S. 72, 97
L.Ed.2d 594 (1977); *Jones*
So.2d 253 (Fla.), *cert. denie*
105 S.Ct. 269, 83 L.Ed.2d 2
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State, 461 So.2d 84 (Fla.198
471 U.S. 1143, 105 S.Ct. 2
706 (1985); *see Pope v. W*
So.2d 798 (Fla.1986), *cert. d*
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[11, 12] As to the first
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[13] Likewise, althoug
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1. Several weeks after the victim's disappearance police found the truck abandoned in Tampa.

2. The court found the following aggravating factors: (1) Sochor was previously convicted of a felony involving the use or threat of violence to the person, § 921.141(5)(b), Fla.Stat. (1989); (2) the killing was committed while Sochor was engaged in the commission of a felony, § 921.141(5)(d); (3) the killing was especially heinous, atrocious, or cruel, § 921.141(5)(h); and (4) the killing was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, § 921.141(5)(i).

3. The verdict form did not indicate whether the jurors found Sochor guilty of first-degree murder based on premeditation or felony murder. Defense counsel neither requested such a specialized jury verdict form nor is one required. *Brown v. State*, 473 So.2d 1260 (Fla.), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985).

4. The court instructed the jury that it could find felony murder based on the felonies of kidnapping or sexual battery, attempt to commit either crime, or escaping from the immediate scene of a kidnapping or sexual battery.

5. We also find sufficient evidence in the record to support the underlying felony of attempted sexual battery. Sochor stated that he wanted to have sex with the victim and that he felt an uncontrollable urge to do so. The next day he thought he had raped "another girl." Gary testified that he saw Sochor on top of the victim while she resisted.

6. Sochor also contends there was insufficient evidence of venue and that the state failed to prove his sanity at the time of the offense beyond a reasonable doubt. We find these claims without merit.

7. Sochor contends that the fo
damental error: (1) prosecuto
facts outside the evidence;
government witnesses as to
and guilt; (3) a defense witn
cross-examination that an in
prosecutor's office compare
Bundy; (4) arguments by the
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for his crimes; (5) other evi
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[10] Sochor next complains of various errors which, taken as a whole, led to an unfair trial. He acknowledges that counsel did not object at trial to any of the complained-of errors and, pursuant to the contemporaneous objection rule, they are not preserved for review. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Jones v. State*, 449 So.2d 253 (Fla.), *cert. denied*, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). Despite the lack of objections, Sochor contends that (1) the trial was so unfair that fundamental error occurred and (2) the contemporaneous objection rule has less force in a capital case. This Court has previously rejected the second argument. *Rose v. State*, 461 So.2d 84 (Fla.1984), *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); *see Pope v. Wainwright*, 496 So.2d 798 (Fla.1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987); *Jones v. Wainwright*, 473 So.2d 1244 (Fla. 1985).

[11, 12] As to the first argument, fundamental error occurs in cases "where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ray v. State*, 403 So.2d 956, 960 (Fla.1981). The error must amount to a denial of due process. *Ray; Castor v. State*, 365 So.2d 701 (Fla. 1978). After carefully reviewing the record, we find that the claimed errors, taken individually or collectively, do not constitute fundamental error.[7] Thus, we reject Sochor's claim.

[13] Likewise, although Sochor now claims various errors in the jury instructions, his counsel neither objected to the challenged instructions nor requested other instructions. Thus, in the absence of fundamental error, these claims also are precluded from appellate review. *See Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); *Castor*. Some of Sochor's claims on this issue merit no discussion;[8] however, others require inquiry.

[14, 15] We first examine Sochor's argument that the trial court committed fundamental error by failing to instruct the jury on voluntary intoxication as a defense to felony murder based on kidnapping. Voluntary intoxication is a defense to felony murder when the underlying felony is a specific-intent crime. *Linehan v. State*, 476 So.2d 1262 (Fla.1985). Kidnapping is a specific-intent crime. *Heddleson v. State*, 512 So.2d 957 (Fla. 4th DCA 1987); *Mullin v. State*, 425 So.2d 219 (Fla. 2d DCA 1983); *see* § 787.01, Fla.Stat. (1989). Although the trial court instructed the jury that voluntary intoxication was a defense to premeditated murder, it did not so instruct the jury with regard to felony murder.

[16–20] Fundamental error is error which goes to the foundation of the case. *Sanford v. Rubin*, 237 So.2d 134 (Fla.1970). Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. Voluntary intoxication is a defense to, but not an essential element of, kidnapping. Therefore, the state did not have to disprove voluntary intoxication in order to convict Sochor of felony murder based on the underlying felony of kidnapping. Because the complained-of instruction went to Sochor's defense and not to an essential element of the crime charged, an objection was necessary to preserve this issue on appeal. Moreover, there was sufficient evidence of attempted sexual battery, a general-intent crime to which voluntary intoxication is not a defense,[9] upon which to base a conviction of felony murder. Sochor's claim as to this point therefore fails.

[21–23] We also address Sochor's argument that the trial court fundamentally erred by failing to instruct the jury on the statute of limitation as an absolute defense to felony murder and kidnapping. This, too, is a defensive matter that must be raised at trial. Had it been raised, the state could have shown that, even though Sochor was indicted for kidnapping beyond the applicable four-year limitation period, his undisputed, continuous absence from the state tolled the running of the statute. *See* § 775.15(6), Fla.Stat. (1989). Thus, the trial court did not commit fundamental error by failing to instruct the jury in this regard. In addition, capital crimes are not subject to a statute of limitation. § 775.15(1), Fla.Stat. (1989). Hence, Sochor's argument that his murder conviction must be overturned and remanded for a new trial because the limitation period had expired on several of the underlying felonies supporting a possible felony-murder theory is untenable.

[24] Finally, we recently held that the failure to give the long-form excusable homicide instruction is not fundamental error. *State v. Smith*, 573 So.2d 306 (Fla. 1990). Sochor's claim as to this point thereby fails.

Our review of the record shows competent, substantial evidence to support Sochor's convictions of kidnapping and first-degree murder. We therefore affirm those convictions.

[25] Turning to the penalty phase, Sochor's first claim is that the trial court improperly allowed the state to present and argue nonstatutory aggravating circumstances. To begin with, Sochor contends that the state introduced victim impact evidence in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Sochor's *Booth* claim is predicated upon prosecutorial comments and arguments to which no objection was made. To preserve a *Booth* issue an objection must be made. In our view, had there been an objection, it would not have been sustained. Thus, this issue is procedurally barred and lacks substance. *Parker v. Dugger*, 550 So.2d 459 (Fla.1989); *Jackson v. Dugger*, 547 So.2d 1197 (Fla.1989).

Sochor also contends that the state presented evidence of his lack of remorse, an improper aggravating circumstance. *Pope v. State*, 441 So.2d 1073 (Fla.1983). After reviewing the record, we find that the prosecutor's comments during closing argument in their totality did not rise to such a level as to pinpoint lack of remorse or warrant a new sentencing trial. *See Bertolotti v. State*, 476 So.2d 130 (Fla. 1985).

[26–29] Sochor further contends that the state introduced improper evidence of prior violent acts through the testimony of his ex-wife, Patricia Neal, and introduced improper hearsay testimony of, and his taped confession to, a rape in Michigan of which there was no conviction. In neither instance did Sochor's counsel object to the testimony, and these points are therefore procedurally barred. Moreover, Ms. Neal's testimony was introduced to rebut Sochor's defense that he became violent only after consuming alcohol; she testified to violent acts by Sochor when he was sober. The testimony regarding the Michigan rape was relevant to rebut the mitigating factor of no significant history of prior criminal activity. The playing of Sochor's taped confession during the penalty phase did not violate *Rhodes v. State*, 547 So.2d 1201 (Fla.1989). Thus, we find no error in these claims. Lastly, Sochor's claim of error with regard to improper prosecutorial comments on this evidence during closing argument has no merit.

[30–32] Sochor's next claim, regarding alleged errors in the penalty jury instructions, likewise must fail. None of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal. *Vaught v. State*, 410 So.2d 147 (Fla.1982). In
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7. Sochor contends that the following were fundamental error: (1) prosecutorial comments on facts outside the evidence; (2) opinions of government witnesses as to Sochor's veracity and guilt; (3) a defense witness's statement on cross-examination that an individual from the prosecutor's office compared Sochor to Ted Bundy; (4) arguments by the state that Sochor's trial was the only time the state could try him for his crimes; (5) other evidence of Sochor's bad character, the victim's good character, beauty, and family; and (6) perjured testimony by a jailhouse informant as to whether he received leniency from the state in return for his testimony regarding Sochor's incriminating statements.

8. We reject without discussion Sochor's claims that the trial court fundamentally erred by failing to properly instruct the jury as to: nondeath lesser-included offenses; manslaughter; third-degree murder; and kidnapping.

9. *Buford v. State*, 492 So.2d 355 (Fla.1986).

10. Sochor contends that the
struction was inadequate be
fine the underlying felony a
the jury that this aggravatin
only applicable to premedit
reject this claim because the
jury on the underlying felon
phase and because this a
stance is applicable to both
premeditated murder. *Whit*
331 (Fla.1981), *cert. denied*,
S.Ct. 3571, 77 L.Ed.2d 1412

So.2d 147 (Fla.1982). In any event, Sochor's claims here have no merit.[10]

[33] Sochor also claims that the prosecutor and trial court denigrated the jury's role in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*. *Combs v. State*, 525 So.2d 853 (Fla.1988); *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Further, Sochor did not raise this claim at trial. Thus, it has not been preserved for review. *Combs*; *Jackson v. State*, 522 So.2d 802 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988).

[34] Turning to the actual sentence, Sochor claims that the evidence did not support three of the four aggravating factors found by the trial court. He does not contest the finding of a previous conviction of a violent felony, and we find this aggravator supported by the record. Sochor does contest the finding that the murder was committed during a felony. We have already found sufficient evidence of both kidnapping and attempted sexual battery. Thus, the evidence supports this aggravating factor.

[35] The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. *Adams*, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So.2d 415, 421 (Fla.1986) (citations omitted), *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). *Accord Johnson v. State*, 465 So.2d 499 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); *Doyle v. State*, 460 So.2d 353 (Fla. 1984). The trial court properly found this aggravating factor.

[36] We disagree, however, that the murder was committed in a cold, calculated, and premeditated manner. Although there was sufficient evidence to support a premeditated murder conviction, this aggravator requires a "heightened" level of premeditation. *Hamblen v. State*, 527 So.2d 800 (Fla.1988). The evidence introduced at trial failed to demonstrate this requisite heightened level of premeditation. Rather, the killing most likely resulted from the victim's refusal to have consensual sex with Sochor and her resistance when he attempted to force himself upon her.

[37] Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, an indescribable feeling comes over him in the form of an irresistible impulse, particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. *Stano v. State*, 460 So.2d 890 (Fla.1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had "selective amnesia." While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.

[38] Sochor also argues that the trial court failed to consider and improperly excluded nonstatutory mitigating evidence. The court in its sentencing order stated "[t]here were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory 'mitigating' circumstances." This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. *King v. Dugger*, 555 So.2d 355 (Fla.1990); *Scull v. State*, 533 So.2d 1137 (Fla.1988), *cert. denied*, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

[39, 40] We also disagree with Sochor's claim that his death sentence is disproportionate. The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. *Robinson v. State*, 574 So.2d 108 (Fla.1991); *Holton v. State*, 573 So.2d 284 (Fla.1990); *James v. State*, 453 So.2d 786 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); *Francois v. State*, 407 So.2d 885 (Fla.1981), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime. *E.g., Hitchcock v. State*, 578 So.2d 685 (Fla.1990); *Tompkins*; *Doyle*.

Finally, we have previously rejected claims that Florida's sentencing process is unconstitutional. *Young v. State*, 579 So.2d 721 (Fla.1991); *Gunsby v. State*, 574 So.2d 1085 (Fla.1991); *Van Poyck v. State*, 564 So.2d 1066 (Fla.1990).

We therefore affirm the convictions of kidnapping and first-degree murder and the death sentence.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES and KOGAN, JJ., concur.

10. Sochor contends that the felony-murder instruction was inadequate because it did not define the underlying felony and did not inform the jury that this aggravating circumstance was only applicable to premeditated murder. We reject this claim because the court instructed the jury on the underlying felonies during the guilt phase and because this aggravating circumstance is applicable to both felony murder and premeditated murder. *White v. State*, 403 So.2d 331 (Fla.1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). We reject without discussion Sochor's other claims: that the instructions as to the aggravating factors of heinous, atrocious, or cruel and cold, calculated, and premeditated were improper; that the instructions as to statutory and nonstatutory mitigating evidence were improper; that the jury was improperly instructed as to the burden and standard of proof with regard to mitigating circumstances; and that Florida's sentencing scheme carries a presumption of death upon the finding of a single aggravating factor.

IN THE NAME AND BY THE AUTHORITY OF THE (CF) (LF)

STATE OF FLORIDA

In the Circuit Court of the Seventeenth Judicial Circuit

of the State of Florida

For Broward County, at the SPRING 1986 Term thereof, on the 9th day of October, in the year of our Lord One Thousand Nine Hundred and Eighty-Six, to-wit: The Grand Jurors of the State of Florida, inquiring in and for the County of Broward, State of Florida, upon their oaths do present that

COUNT I

DENNIS SOCHOR

on the 1st day of January, in the year of our Lord One Thousand Nine Hundred and Eighty-Two, in the County of Broward, State of Florida, did then and there unlawfully and feloniously and from a premeditated design to effect the death of a human being, PATRICIA MARIE GIFFORD, did kill and murder the said PATRICIA MARIE GIFFORD, by asphyxiation, against the form of the statute in such case pursuant to Section 782.04(1) of the Florida Statutes, and

COUNT II

that DENNIS SOCHOR on the 1st day of January, in the year of our Lord One Thousand Nine Hundred and Eighty-Two, in the County of Broward, State of Florida, did unlawfully and forcibly, secretly, or by threat, confine, abduct or imprison PATRICIA MARIE GIFFORD against her will and without lawful authority with intent to commit or facilitate commission of a felony, to-wit: sexual battery,

against the form of the statute in such case pursuant to Section 787.01 of the Florida Statutes, made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

A TRUE BILL:

FOREMAN

I HEREBY CERTIFY that I have advised the Grand Jury returning the Indictment as authorized and required by law.

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Assistant State Attorney for the Seventeenth Judicial Circuit of the State of Florida, Prosecuting for said State. #29

APP. B

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT BROWARD COUNTY, FLORIDA

CASE NO: 86-15270 CF

JUDGE: RUSSELL E. SEAY, JR.

STATE OF FLORIDA,

Plaintiff,

vs.

DENNIS SOCHOR,

Defendant.

SENTENCE ORDER

The Defendant, Dennis Sochor, was indicted on October 9, 1986 for the crimes of Murder In The First Degree in Count I and Kidnapping in Count II of the Indictment.

The case was tried before a duly empaneled jury commencing on October 13, 1987 and concluding on October 20, 1987. The jury, having heard the evidence and the law instructed by the Court, concluded the guilt phase of the trial by finding the Defendant guilty of First Degree Murder and of Kidnapping as charged in the Indictment.

On October 21, 1987, a separate proceeding on the issue of penalty was conducted before the same trial jury as mandated by the provisions of Florida Statutes 921.141(1). After hearing further testimony, argument of counsel, instructions by the Court, and due deliberations, the jury returned an advisory sentence of death by a vote of ten (10) to two (2).

Pursuant to the provisions of Florida Statute 921.141(3), the Court hereby makes the following findings of fact:

AGGRAVATING CIRCUMSTANCES

1. The Court finds, according to Florida Statute 921.141(5)(b), that the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to another person. The Defendant was arrested on March 14, 1980 for Sexual Battery and Kidnapping. In State of Florida vs. Dennis Paul Grant, Case #80-2497-CF, the Defendant, Dennis Sochor, using the alias of Dennis Paul Grant, pled to Sexual Battery and was sentenced on September 30, 1980.

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Filed In Open Court,
ROBERT E. LOCKWOOD,
CLERK
ON NOV 02 1987
BY Deborah Berry

APP. C

2. The Court finds, according to Florida Statute 921.141(5)(d), that the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit any Sexual Battery or Kidnapping. The jury convicted the Defendant of Kidnapping in Count II of the Indictment. There is sufficient evidence to prove the victim was taken from the Banana Boat and at some point held against her will. She was forcibly dragged out of the truck as she resisted and pleaded for help. As to the attempt to commit Sexual Battery, the Defendant, from his own statements to law enforcement officers, indicated he wanted sex and when the victim refused him he became angry and the fight ensued. The Defendant said he had these urges for sex. Even though there is no evidence the Defendant actually sexually assaulted the victim as the body was never found, the Defendant's admissions prove the death occurred as he was attempting to sexually assault her. The Court finds that both of these felonies were committed or attempted to be committed but the Court considers this as only one aggravating circumstance.

3. The Court finds, according to Florida Statute 921.141(5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that a violent struggle ensued as confirmed by the Defendant's statements to the police officers. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceeding the victim's

death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

4. The Court finds, according to Florida Statute 921.141(5)(i), that the crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence indicated that the Defendant pulled the victim out of the pickup at night along an abandoned road and proceeded to strangle her. He disposed of the body so it could never be found. The Defendant had previously been put on probation for Sexual Battery and knew the consequences if the victim survived and notified the Police Department. There is no question that it was committed in a cold and calculating manner as the Defendant told a witness who testified that he had choked someone to death in Fort Lauderdale, Florida and how easy it was to do. Furthermore, a cellmate testified that the Defendant had stated he had "killed the fucking slut bitch". There is no pretense of moral or legal justification.

MITIGATING CIRCUMSTANCES

1. The Defendant has no significant history of prior criminal activity. This mitigating circumstance does not apply. To the contrary, the Defendant has a most significant history of prior criminal activity. The Defendant admitted he had committed a rape in Michigan which case is still pending. According to the Doctors' reports introduced in evidence and all of the testimony, it indicates a very significant history of criminal activity.

2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent. Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollections of the murderous incident.

3. The victim was a participant in the Defendant's conduct or consented to the act. This mitigating circumstance does not apply. The victim, Patricia Gifford, was a helpless and fearful 18 year old girl and in no way consented to this act.

4. The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. This mitigating circumstance does not apply. All the evidence indicated that, even though the Defendant's brother was there, he attempted to stop the Defendant from committing this brutal murder.

5. The Defendant acted under extreme duress or under the substantial domination of another person. This mitigating circumstance does not apply.

6. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law

if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

7. The age of the Defendant at the time of the crime. This mitigating circumstance does not apply. The Defendant's birth date is February 25, 1952 and at the time of the crime he was twenty-nine (29) years old.

8. Any other aspect of the Defendant's character or record and any other circumstance of the offense. There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

In Summary, it is the conclusion of the Court, after carefully and conscientiously weighing the aggravating and mitigating circumstances, that there are sufficient aggravating circumstances to justify and warrant the imposition of the death penalty and that there are no mitigating circumstances to outweigh the aggravating circumstances. It is, therefore,

THE SENTENCE OF THIS COURT that you, Dennis Sochor, be sentenced to death for the murder of Patricia Gifford.

It is further ordered that you, Dennis Sochor, be taken by the proper authorities to the Florida State Prison and be kept in close confinement until the day of your execution and that on that day you be put to death by electrocution, which is the manner prescribed by law, and may God have mercy on your soul.

You, Dennis Sochor, are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida. You are further advised that you have the right to the assistance of counsel in the filing and preparation of your appeal. If you cannot afford your own attorney, you should advise the Court and an attorney will be appointed for you.

DONE AND ORDERED in open court, Broward County Courthouse, Fort Lauderdale, Florida, this 2 day of November, 1987.

Russell E. Seay

HONORABLE RUSSELL E. SEAY, JR.
Circuit Court Judge